

121 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ISO New England Inc.

Docket No. RT04-2-016

ORDER DENYING MOTION FOR LIMITED WAIVER
OF AUDIT REQUIREMENTS

(Issued October 30, 2007)

1. In this order, the Commission denies ISO New England Inc.'s (ISO-NE) request for limited waiver of section 35.34(j)(1)(iv)(A) of the Commission's regulations,¹ which requires an audit of the independence of the ISO-NE's decision making process (Independence Audit) as a Regional Transmission Organization (RTO).

I. Background

2. On December 20, 1999, the Commission issued Order No. 2000.² Among other things, in Order No. 2000 the Commission required RTOs to be independent of market participants. Specifically, in addition to RTO staff being financially independent of market participants, the Commission was concerned that the RTO must have a decision-making process that is independent of control by any market participant or class of market participants. Accordingly, the Commission added section 35.34(j)(1)(iv) to its regulations, codifying a requirement for audits with respect to independence. Section 35.34(j)(1)(iv)(A) requires that such audit be performed two years after the Commission's approval of the RTO.³ The Commission concluded that this auditing

¹ 18 C.F.R. § 35.34 (j)(1)(iv)(A) (2007).

² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

³ Order No. 2000-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 at 31,367.

requirement “struck an appropriate balance among the goals of having a sufficient check on independence, allowing time for some initial operational shake-out, and not imposing overly burdensome procedures.”⁴

II. Request for Waiver

3. Pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure,⁵ ISO-NE filed a motion for limited waiver of section 35.34 (j)(1)(iv)(A)’s requirement for an audit of the independence of the ISO-NE’s decision-making process as an RTO.

4. ISO-NE requests that its Independence Audit be postponed until such time at which the Commission’s auditors are performing their next audit of the ISO-NE and conducted by the Commission’s auditors. For the reasons stated below, ISO-NE states that granting a limited waiver would be appropriate from a policy perspective and would be consistent with the Commission’s practice to date.

- Efficiency: From the Independent Audit Clarification Order,⁶ it is efficient to combine a review of RTO independence with other compliance reviews of RTOs for other regulatory requirements;
- Efficacy: Commission auditors have a degree of impartiality equivalent to that of a private sector audit firm;
- Conservation of RTO financial resources: Grant of the waiver would avoid the expenditure of RTO funds to retain a non-affiliated audit firm to perform an “agreed upon procedures review”;
- Absence of pressing substantive need: There are no pending complaints or other proceedings regarding the independence of ISO-NE’s decision making as an RTO. Further, the issuance of the Advanced Notice of Proposed Rulemaking (ANOPR) in Docket Nos. RM07-19-000 and AD07-7-000 indicates that the Commission is currently engaged in a reassessment of the independence requirements for RTOs and Independent System Operators (ISO) and a brief delay in the performance of ISO-NE’s Independence Audit will permit the benefits of such reassessment to be considered in the audit;⁷ and

⁴*Id.*

⁵ 18 C.F.R. § 385.212 (2007).

⁶ Motion at 2 (citing *PJM Interconnection L.L.C.*, 106 FERC ¶ 61,168 (2004) (Independence Audit Clarification Order)).

⁷ ISO-NE cites its September 17, 2007 comments in Docket Nos. RM07-19-000 and AD07-7-000 and notes that the New England Power Pool Participants Committee expresses satisfaction with its regional decision making processes.

- Consistency with Commission practice to date: The only independence audits to date—for PJM Interconnection, L.L.C. (PJM) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO)—have been performed by Commission auditors. Further, the Commission’s audit staff performed the required Independence Audit for PJM and Midwest ISO because staff was already performing an audit of each of those RTOs and requiring each to perform its own Independence Audit would have been duplicative.⁸

5. ISO-NE requests Commission action between its filing date, October 3, 2007, and November due to a limited window of availability of the audit firm that ISO-NE would use to conduct the audit in the event that its waiver request is denied.

III. Notice of Filing and Responsive Pleadings

6. Notice of the ISO-NE’s filing was published in the *Federal Register*, 72 Fed. Reg. 58,652 (2007), with motions to intervene and protests due on or before October 17, 2007. The New England Power Pool (NEPOOL) Participants Committee filed a timely motion to intervene and comments.

7. The NEPOOL Participants Committee does not oppose ISO-NE’s request for a limited waiver. The NEPOOL Participants Committee agrees with ISO-NE that the incurrence of separate audit expenses would add costs that have not been identified as desirable or necessary and which necessarily would fall on NEPOOL Participants.⁹ The NEPOOL Participants Committee also agrees that an Independence Audit at this time would necessarily distract ISO-NE personnel from important priority tasks they have recently identified to the Commission.¹⁰ However, NEPOOL states that its ANOPR comments did not go to the issue of whether audit of ISO-NE’s independence now or

⁸ *Id.*

⁹ The NEPOOL Participants Committee notes that section 15.1 of the Participants Agreement provides that, at the request of the NEPOOL Participants Committee, ISO-NE “shall engage an independent third party to be chosen by mutual agreement of ISO and the NEPOOL Participants Committee to conduct a periodic audit of ISO’s performance and shall cooperate fully in the conduct of such audits.”⁹ Further, the scope of the audit under section 15.1 of the Participants Agreement can encompass a review of the same factors considered as part of an Independence Audit. The NEPOOL Participants Committee also notes that since 2000 NEPOOL and ISO-NE have conducted two audits of aspects of ISO-NE’s performance. The NEPOOL Participants Committee adds that NEPOOL has not requested an audit of ISO-NE, but if any concern of NEPOOL regarding independence in the ISO-NE’s decision-making process is identified, NEPOOL would have the right seek an audit.

¹⁰ *Id.* at 5 (citing *ISO New England Inc.* June 21, 2007 Compliance Filing, Docket No. ER07-546-002, *et al.*).

later is desired or appropriate, and that NEPOOL cannot conclude that approval of the ANOPR comments signals affirmative support for the requested waiver as the requested waiver was not submitted to NEPOOL for a formal vote.

IV. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹¹ the timely unopposed motion to intervene serves to make the NEPOOL Participants Committee a party to this proceeding.

B. Substantive Matters

9. ISO-NE does not dispute that the Commission's regulations require that an Independence Audit be conducted two years after an RTO has been approved. ISO-NE was approved as an RTO in February 2005, and has been in operation for at least two years. Thus, under section 35.34(j)(1)(iv)(A), ISO-NE is required to perform an Independence Audit.

10. Notwithstanding that it may be more efficient for ISO-NE to have the Commission staff combine its review of ISO-NE's independence with another compliance review, it is uncertain at this time when the Commission's audit staff will be performing an audit of ISO-NE. With respect to the added costs of an Independence Audit, the Commission likewise continues to believe that an appropriate balance has been struck between maintaining a sufficient check on independence and the burden of the procedures.

11. ISO-NE asserts that there is no need to perform an Independence Audit now because there are no pending complaints or other proceedings regarding its independence. ISO-NE misses the primary purpose of such an audit. The Independence Audit is intended to provide reasonable assurance that ISO-NE is operating independently, based on evidence gathered during the audit that may not even be known to parties outside of the RTO. In order to provide such assurance to the Commission, as well as to the RTO's stakeholders and the general public, such audits must be conducted periodically (after the initial two-year period and subsequently every three years, as specified in the regulations) and should not wait until an unspecified future date when the Commission may be performing other audits of the RTO.

12. Furthermore, we disagree that, because two Independence Audits were conducted by Commission staff, such practice must or should be followed here. Rather, the Independence Audit Clarification Order explained the specific circumstances with respect to the Independence Audits of PJM and Midwest ISO. That order explained that the Commission's auditors were already in the process of auditing PJM and Midwest ISO for

¹¹ 18 C.F.R. § 385.214 (2007).

independence. Requiring PJM and Midwest ISO to contract for separate Independence Audits thus would have been duplicative.¹² Having already committed to audit PJM and Midwest ISO, the Commission's auditors undertook to perform the Independence Audits of these RTOs. This *ad hoc* decision to combine ongoing audits with the Independence Audits, however, is not to be interpreted as a Commission practice that must or should be followed here. A critical difference is that, unlike with PJM and Midwest ISO, here there is no Commission staff audit already underway or about to begin. Section 35.34(j)(1)(iv)(A) continues to require that RTOs provide "a compliance audit of the independence of the [RTO's] decision making process" in accord with the time period set forth in the relevant regulation. Therefore, ISO-NE must perform an Independence Audit as required by section 35.34(j)(1)(iv)(A). Accordingly, we will deny ISO-NE's request for waiver of the Independence Audit requirements.

The Commission orders:

ISO-NE's request for waiver is hereby denied for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

¹² 106 FERC ¶ 61,168 at P 1, 5 ("Individual audits on the part of PJM and Midwest ISO would be duplicative of the Commission's current audit, and are, therefore, unnecessary.").